Statement of

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House Committee on the Judiciary
Subcommittee on Crime, Terrorism, and Homeland Security

HEARING ON

H.R. 5219

JUDICIAL TRANSPARENCY AND

ETHICS ENHANCEMENT ACT OF 2006

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Mr. Chairman, Ranking Member Scott, and Members of the Subcommittee:

Thank you for inviting me to express my views at this hearing on H.R. 5219, the Judicial Transparency and Ethics Enhancement Act of 2006. I support the bill because recent developments have demonstrated that there are gaps and inadequacies in the present system of judicial accountability, and H.R. 5219 is a reasonable means of closing the gaps and dealing with the inadequacies. I do have a few suggestions for fine-tuning the bill, primarily to assure that the new mechanisms will be fully integrated into the existing statutory structure.

Before elaborating on these points, I will say a few words by way of personal background. I am a professor of law at the University of Pittsburgh School of Law, where I was recently appointed as the inaugural holder of the Sally Ann Semenko Endowed Chair. I have been studying the operation of the federal courts for more than 30 years. During that period, I have written numerous articles, books, and book chapters dealing with various aspects of the federal judicial system. Last year, I published (with Dean Lauren Robel of the Indiana University School of Law) a new casebook, FEDERAL COURTS: CASES AND MATERIALS ON JUDICIAL FEDERALISM AND THE LAWYERING PROCESS. Of particular relevance to this bill, I testified at a hearing of the Subcommittee on Courts, the Internet and Intellectual Property in November 2001 on "Operation of the Judicial Misconduct Statutes." Subsequent to that hearing, Chairman Coble, joined by Ranking Member Berman, introduced the bipartisan Judicial Improvements Act of 2002, which became law as part of the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273.

I. The Need for New Legislation

The federal judicial system is the envy of civilized nations throughout the world. Its stature rests in large part on two essential features: judicial independence and judicial integrity. For the most part, judicial independence and judicial integrity reinforce another. In one respect, however, there is a tension between the two. Because human beings are fallible, it is generally accepted that some mechanism is required to identify and correct instances in which particular judges have strayed from the norms of "good behavior." But if the process is too bureaucratic, too heavy-handed, or too quick to move to formal adjudication, it poses a threat to the judges' independence.

Over the years, Congress has taken an active role in striking an appropriate balance, and the results of its work are reflected in several provisions of Title 28. Section 144 establishes procedures for assuring that no case is heard by a judge who "has a personal bias or prejudice" against or in favor of any party. Section 455 lays down elaborate rules to govern the disqualification of judges and avoid conflicts of interest. Most important, Chapter 16 creates a detailed set of procedures for handling complaints against judges and taking appropriate action in instances of judicial misconduct.

Chapter 16 originated in the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (to give it its full name). The 1980 law, initially codified as section 372(c) of the Judicial Code, established a new set of procedures for judicial discipline and vested primary responsibility for implementing them in the federal judicial circuits. In essence, Congress opted for a regime that has aptly

been described as one of "decentralized self-regulation."[1] Minor changes were made in later years, notably in the Judicial Improvements Act of 1990. More substantial revisions were made in 2002 when Congress enacted the bipartisan Judicial Improvements Act of 2002, cosponsored by Chairman Coble and Ranking Member Berman of the Subcommittee on Courts, the Internet and Intellectual Property. It was the 2002 law that gave the judicial misconduct provisions their own chapter in the United States Code, Chapter 16.

If, at the hearing that preceded the enactment of the Judicial Improvements Act of 2002, Chairman Coble had asked me whether any substantial modifications were required in the existing statutory arrangements, I would have said "No." However, three recent sets of developments suggest a different conclusion today.

A. A gap in the misconduct statutes

In April 2006, the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders handed down a 3-2 decision holding that, under present law, the Judicial Conference of the United States has no authority to review a Circuit Judicial Council order dismissing a complaint of judicial misconduct, even if the Chief Judge of the circuit should have appointed a special investigating committee but failed to do so.[2] The complaint involved an allegation of misconduct by District Judge Manuel Real of the Central District of California. Professor Rotunda, in his statement today, has described that decision in some detail, and I will not retrace that ground here.

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[1] See Jeffrey N. Barr & Thomas E. Willgang, *Decentralized Self-Regulation, Accountability, and Judicial Independence Under the Federal Judicial Conduct and Disability Act of 1980*, 142 U. Pa. L. Rev. 25, 29 (1993) (hereinafter "FJC Study").

[2] In re Opinion of Judicial Conference Committee to Review Circuit Council Conduct, --- F.3d ----, 2006 WL 1344908 (Apr. 28, 2006) [hereinafter Judicial Conference Committee Opinion].

One might respond by saying that a single high-profile episode, however lamentable, does not prove that the system does not work. Moreover, subsequent to the Judicial Conference ruling, Chief Judge Schroeder issued an order appointing a special committee to investigate the charges against Judge Real;[3] thus, one might argue that the system *did* work, albeit after much delay and several detours.[4] However, I do not find these responses persuasive. For one thing, a single widely publicized episode can create grave public doubt about the effectiveness and even the legitimacy of the process. Judge Ralph K. Winter, Jr. (joined by Judge Carolyn R. Dimmick) made this point in his dissent from the Judicial Conference Committee decision:

> The judicial misconduct procedure is a self-regulatory one. It is self-regulatory at the request of the judiciary in a legitimate effort to preserve judicial independence. A self-regulatory procedure suffers from the weakness that many observers will be suspicious that complainants against judges will be disfavored. The Committee's decision in this case can only fuel such suspicions.[5]

Beyond this, one really cannot say that, from a systemic perspective, "all's well that ends well." Although the order establishing the special committee was issued on May 23, it has not yet been posted on the Ninth Circuit's web site. Nor is it

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[3] In re Complaint of Judicial Misconduct (Judicial Council of the Ninth Circuit, May 23, 2006) (Nos. 04-89030 and 05-89097).

[4] Technically, the order of May 23 did not direct the special committee to investigate the allegations contained in the original complaint against Judge Real; rather, it initiated an investigation of two later complaints. But Chief Judge Schroeder stated explicitly that the investigation "should cover all matters reasonably within the scope of the 'facts and allegations' of complaint No. 05-89097, including the nature and extent of any ex parte contact with [Judge Real], as well *as any related matters raised by the Judicial Council in its remand to me after my first dismissal of [the initial complaint against Judge Real*]." (Emphasis added.)

[5] Judicial Conference Committee Opinion, supra note 2, at *11.

available on Westlaw or Lexis. Transparency is an important part of accountability, but the interest in transparency has not been well served.

B. Unnecessary controversies over failure to recuse

The second set of developments involves judicial disqualification and the conflict-of interest statutes. During the past year, blogs and advocacy groups have accused two district judges (James H. Payne of the Eastern District of Oklahoma and Terrence W. Boyle of the Eastern District of North Carolina) of failing to recuse themselves from cases involving companies in which they held investments. Both judges had been nominated to their respective courts of appeals; one has already withdrawn as a nominee, and the other has been subjected to harsh criticism.

I take no position on whether the accusations are well founded. My concern, rather, is that the controversies have been harmful to the judiciary as well as to the particular judges – and that the controversies could easily have been avoided.

In February 2002, Chairman Coble of the Subcommittee on Courts, the Internet and Intellectual Property, joined by Ranking Member Berman, wrote to Chief Justice Rehnquist in his capacity as presiding officer of the Judicial Conference of the United States. The purpose of their letter was to offer recommendations to the Judicial Conference for measures that would "both improve the operation of Article III courts and instill even greater public confidence in [the work of the courts]."[6] One of the principal suggestions was that the Judicial Conference should "require all federal courts to adopt the Iowa model" for posting "conflict lists" on court web sites. The letter began by

[6] The letter is set forth in its entirety in H.R. Rep. 107-459 at 16-18 (May 14, 2002).

describing allegations of failure to recuse that are disturbingly similar to the ones lodged in 2006 against Judge Payne and Judge Boyle:

> You will recall the *Kansas City Star* articles from 1998 that detailed alleged instances of judges adjudicating cases in which they held financial interests. The Community Rights Counsel, which had a representative testify at our hearing, also has published literature that raises questions in some minds about judges' compliance with the laws governing disqualification. While the hearing did not reveal that the practice was systemic or based on a conscious desire by individual judges to influence the value of personal holdings, the damage that such stories or other publications inflict on the reputation of the courts is self-evident.

The letter continued by explaining the nature of the problem and how the "Iowa model" offered a "template for the rest of the federal judiciary":

> Part of the problem, according to journalists and other interested parties, is that judicial disclosure forms filed pursuant to the Ethics in Government Act are difficult to obtain. The Northern and Southern Districts of Iowa have responded to this situation in a manner that might serve as a template for the rest of the federal judiciary. Both Districts post "conflict lists" on their respective web sites. The benefits of this practice are manifest: the likelihood increases that genuine conflicts will be flagged earlier in the litigation process; journalists and advocacy groups will have greater access to relevant information that will enable them to monitor judicial compliance with conflict-of-interest requirements; the lists can be more easily updated than annual hard-copy disclosure filings; and the legitimate privacy and safety interests of judges [are] not compromised (since the lists only indicate that a judge is recused from cases involving specific corporations, and nothing more).
>
> Consistent with this precedent, we urge the Conference to require all federal courts to adopt the Iowa model. Specifically, each court should implement and monitor procedures for assuring that judges regularly inform the appropriate Clerk of Court of those changes in stock holdings and other financial holdings which would necessitate revisions to the appropriate conflict list. Judges should also be encouraged to work with their brokers or other financial advisors to ensure that the relevant portfolio information is available in a timely manner to the Clerk for such purposes.

The Judicial Conference adopted two other suggestions in the Coble-Berman letter (including one about posting links to complaint forms), but as far as I am

aware, the Conference never acted on the suggestion about posting conflict lists.[7] Neither Judge Payne nor Judge Boyle has adopted the Iowa model. If they had done so, the controversies might have been avoided.

It is regrettable that the Judiciary on its own has not taken the steps that would make it much easier to assure compliance with the disqualification requirements of 28 USC § 455. This institutional failure is a good reason for taking another look at the system.

C. Silence from the Breyer Committee

In May 2004, after consulting with Chairman Sensenbrenner, Chief Justice Rehnquist established a committee, chaired by Justice Stephen Breyer, "to evaluate how the federal judicial system has implemented the Judicial Conduct and Disability Act of 1980." That, of course, was more than two years ago. As far as I am aware, the Breyer Committee has not issued any reports. It has not held any public hearings, nor has it extended any formal invitations for public comment.

If the Breyer Committee had issued a report – even an interim report – the Subcommittee might be able to consider some alternative suggestions for legislation to improve the operation of the judicial misconduct statutes. At the least, the Subcommittee would have the benefit of the considered views of the judiciary, based on experience, of the effectiveness of current procedures. But we

[7] In September 2002, the Judicial Conference "[urged] every federal court to include a prominent link on its website to its circuit's forms for filing complaints of judicial misconduct or disability and its circuit's rules governing the complaint procedure." The Conference also "[encouraged] chief judges and judicial councils to submit non-routine public orders disposing of complaints of judicial misconduct or disability for publication by on-line and print services." The Conference noted that these suggestions came from "two members of Congress."

do not have either of those things. And in their absence, it makes sense to consider H.R. 5219.

II. The Virtues of H.R. 5219

The basic thrust of H.R. 5219 is to create an "Office of Inspector General for the Judicial Branch." The bill lists several duties that the Inspector General would perform; the most important of these is to "conduct investigations of matters pertaining to the Judicial Branch, including possible misconduct in office of judges and proceedings under chapter 16 of this title, that may require oversight or other action within the Judicial Branch or by Congress." Other functions include conducting audits and preventing and detecting waste, fraud, and abuse.

Although one member of the Supreme Court has described the proposed Inspector General as "scary idea," that characterization ignores the many important virtues of H.R. 5219. Indeed, I think the sponsors of the bill have taken great pains to design the new mechanism in a way that respects the status of the Judiciary as a coequal and independent branch of government.

First, the new Office would be established *within the Judicial Branch*.[8] That placement in itself goes a long way to addressing concerns about judicial independence. I would have grave concerns if Congress were to authorize investigations of the judiciary by a new entity that was part of the Legislative or Executive Branches. H.R. 5219 avoids those concerns.

Second, the bill provides for *appointment* of the Inspector General *by the Chief Justice of the United States* "after consultation with the majority and

[8] The legislation provides that the Office is established "for" the Judicial Branch, and the provisions are in Title 28. It might be desirable to make explicit that the Office would be established as part of the Judicial Branch.

minority leaders of the Senate and the Speaker and minority leader of the House of Representatives." This too provides substantial reassurance that the new system will respect the independence of the judiciary. I suspect that the Chief Justice would appoint a sitting or retired Article III judge, thus reinforcing the independence of the Office from Congress or the Executive.

Third, Chairman Sensenbrenner, the principal sponsor of the bill, has emphasized that "this independent Inspector General *will not have any authority or jurisdiction over the substance of a judge's opinions*."[9] (Emphasis added.) He explained: "Judicial independence of opinions is a sacred foundation of our constitutional form of government of checks and balances and separation of powers that must not be tampered with." Nothing in the bill contradicts this assurance; however, to quell the fears that one witness today has expressed, it would be desirable to include similar language in the legislation itself.

Fourth, H.R. 5219 excludes the Supreme Court of the United States from its coverage. In this respect it differs from the companion legislation introduced by Senator Grassley as S. 2678. I believe that the House bill is substantially preferable on this score. It would be unseemly, at the least, for a subordinate officer within the Judicial Branch (or elsewhere) to investigate Justices of the Supreme Court. Nor has any need been shown for such a radical measure.

Finally, the Inspector General would have no power to discipline or penalize any judge. The structure of the bill makes clear that if the Inspector General does identify misconduct by a judge, the Inspector General would have to refer the matter to other entities "within the Judicial Branch or … Congress" for action.

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[9] News Advisory (Apr. 27, 2006) http://judiciary.house.gov/media/pdfs/judgeIGintro42706.pdf (quoting Chairman Sensenbrenner).

With all of these limitations and safeguards, there is no reason to describe H.R. 5219 as "scary" or an "assault" on the judiciary. On the contrary, what H.R. 5219 does is to create an entity within the Judicial Branch whose primary task would be to strengthen judicial ethics and enhance transparency. Under existing arrangements, those tasks are, in different ways, the responsibilities of every member of the judiciary. But all too often, when everyone is responsible, no one is accountable. By designating a "point person" within the Judiciary with special responsibility for matters of ethics and disclosure, H.R. 5219 would substantially promote accountability.

III. Fine-Tuning H.R. 5219

Although H.R. 5219 avoids many of the pitfalls that some people might have feared in legislation of this kind, no bill is perfect, and in this section of my statement I offer some suggestions for fine-tuning H.R. 5219.

A. The role of the Inspector General in misconduct proceedings

My principal concern is that the proposed new § 1023(1) of Title 28 [Page 2, lines 14-22] does not adequately explain how the functions of the new Office would be integrated into the existing statutory structure for dealing with complaints against judges. In particular, the bill could be read as authorizing the Inspector General to conduct an investigation of alleged judicial misconduct simultaneously with the Chief Judge of a circuit, the circuit Judicial Council, or the Judicial Conference of the United States. This duplication of effort would be wasteful, inefficient, and confusing.

Fortunately, there is a simple fix: to avoid these unfortunate consequences, the legislation should make clear that the Inspector General's responsibilities would not begin until after the Chief Judge and the Circuit Judicial Council have

completed their work. This in turn suggests that the Inspector General's duties should be divided into two categories, one for cases in which a special committee has been appointed, and one for cases (like the *Real* matter) in which the Chief Judge has dismissed the complaint and the Circuit Judicial Council has denied review.

1. Special-committee cases

Chapter 16 already sets forth detailed procedures for cases in which a special committee has been appointed under 28 USC § 353(a). Among other things, the special committee must file "a comprehensive written report" with the Judicial Council of the circuit. Under § 354, the Council has a variety of options after receiving that report. But whatever the Council does, an aggrieved complainant or judge "may petition the Judicial Conference of the United States for review" of its action.

In that setting, I suggest that the Inspector General can best serve as an arm of the Judicial Conference, performing a role akin to that of a Special Master to the United States Supreme Court in original-jurisdiction cases. The Inspector General can engage in further investigation, prepare materials for consideration by the Conference (or its Committee to Review Circuit Council Conduct), or formulate recommendations.

2. Other cases

A different – and more robust – role is called for when no special committee has been appointed. As the majority judges in the *Real* decision emphasized, current law provides that when the Circuit Chief Judge dismisses a complaint, there is one level of review, and only one – by the Circuit Council. If the Circuit Council denies the petition for review, that denial "shall be final and conclusive

and shall not be judicially reviewable on appeal or otherwise." (See 28 USC § 352(c).)

One of the reasons for this preclusion provision is that Congress did not want to burden the Judicial Conference of the United States with the obligation to review hundreds of petitions, the overwhelming majority of which would be plainly frivolous. But the consequence is that review is also precluded in the occasional case that warrants it. As the majority of the Judicial Conference Committee acknowledged, "a chief judge may avoid review by the Judicial Conference ... by the simple expedient of failing to appoint a special committee under § 353 and instead dismissing a complaint under § 352(b)." The dissenters put the matter even more strongly: "[D]enial of review [when no special committee has been appointed] means that chief circuit judges and circuit judicial councils are free to disregard statutory requirements. In fact, by disregarding those requirements, they may escape review of their decisions."

Creating the Office of Inspector General provides an excellent opportunity to correct the flaw revealed by the *Real* decision, without requiring the Judicial Conference (or its committee) to review scores or hundreds of frivolous applications. My suggestion is that the Inspector General should serve as a gatekeeper. Congress would amend § 352(c) to authorize the Judicial Conference to review Council action when no special committee has been appointed – but only if the Inspector General allows the proceeding to go forward. This could be done through a procedure analogous to the "certificate of appealability" required for habeas corpus appeals under 28 USC § 2253(c).

If the Judicial Conference decides to review a matter, the Inspector General would carry out the necessary investigations and perhaps prepare findings of fact

and recommendations for action. In undertaking these tasks the IG would of course have the various powers conferred by the new section 1024.

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I have not attempted to work out all the details, but I believe that the arrangement outlined here: (a) would enhance the effectiveness of Judicial Conference review; and (b) would provide the "confidence builder" that the dissenters in the *Real* decision sought; but (c) would not impose undue burdens on the Conference.

B. Other possible revisions

I have a few other modest suggestions for improving the bill. First, I cannot help thinking that some of the over-the-top reaction to the proposal is a function of the label "Inspector General." It is true, as Professor Rotunda points out, that "a host of federal agencies" have Inspectors General; yet there seems to be something about the name in the judicial context that makes the position seem overbearing or even hostile. Perhaps the new officer could be designated as the Special Counsel to the Judicial Conference of the United States.

Second, as mentioned earlier, I suspect that the Chief Justice might well want to appoint a sitting judge – perhaps a judge with a background in law enforcement – to serve as the Inspector General. Appointment of an Article III judge would have the benefit of giving special independence and strength to the fledgling position. For that reason, it would be desirable to amend the bill to include whatever provisions are necessary to make this possible, along the lines of existing provisions governing the Director of the Federal Judicial Center.

Third, it might be desirable to make more explicit the responsibility of the Inspector General for promoting transparency in matters involving misconduct or

possible conflicts of interest. For example, the IG might be tasked with implementing and monitoring a Web-based system for posting judges' conflict lists and keeping them up to date. Similarly, the IG might be given the responsibility for assuring that orders disposing of misconduct complaints are made available to the public in accordance with the Judicial Conference's 2002 directive.[10]

Finally, as already suggested, there is much to be said for making clear in the statute itself that the Inspector General would have no authority over the substance of judicial decisions. I note, however, that the fine-tuning of § 1023(1) suggested above would go a long way toward confining the Inspector General's authority to matters that are within the scope of Chapter 16.

IV. Conclusion

Some of the negative reaction to H.R. 5219 seems to be driven by the assumption that because some of the bill's proponents have criticized "judicial activism," the bill itself must be aimed at punishing judges for their judicial decisions. While it is of course true that "context matters," I have taken H.R. 5219 for what it purports to be – an effort to strengthen the ability of the judiciary to assure compliance with the statutes governing misconduct and disqualification. From that perspective, creation of an Inspector General can be a positive step. And with the modest suggestions offered here, the new Office could be even more effective in preserving the integrity as well as the independence of the judiciary.

[10] See supra note 7.